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VIRGINIA LAW REVIEW

VOL. I.

MAY, 1914

No. 8

EFFECT OF RECOVERY BY INJURED PERSON AS BAR TO ACTION FOR HIS DEATH.

NOTHING is better settled than that at common law the right of action for an injury to the person was extinguished by the death of the party injured. The rule *action personalis moritur cum persona*, applied whether the death from the injury was instantaneous or not.¹

This has been said to be one of the notable defects of the common law, and, although that system has been repeatedly lauded as the perfection of human reason, it is worthy of note that the courts have been unable to assign any satisfactory reason for the rule. It has been said that the reason "is to be found in that natural and almost universal repugnance among enlightened nations to setting a price upon human life or any attempt to estimate its value by a pecuniary standard, a repugnance which seems to have been strong and prevalent among nations in proportion as they have been or become more enlightened and refined."²

It has been frequently suggested that the rule is founded upon the theory that because at common law an act which caused death was a felony, the civil cause of action was merged in the criminal offense. In *Green v. Hudson River R. Co.*,³ Seward, J., said:

"It is of no practical utility to search for the reason of the rule. It remains somewhat obscure. Whether it arose from

¹ *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59.

² *Hyatt v. Adams*, 16 Mich. 180.

³ 2 Keyes (N. Y.) 294.

the sentimental reason that the destruction of life by negligence was an injury that cannot be compensated in damages, or from the policy of the law to secure the greater safety of life and limbs by merging the right to damages by a civil action in the felony resulting from the killing of a human being by the negligent act of another, thus insuring the cooperation of the next of kin, as may be supposed, in the vigorous prosecution of the criminal and preventing the composition or settlement of such offense, as I am inclined to believe, it is now of little consequence to inquire."

It was first distinctly announced in the case of *Baker v. Bolton, et al*,⁴ in which the plaintiff brought an action against the proprietors of a stage coach that was overturned while he and his wife were traveling in it, whereby he was much bruised and his wife so severely hurt that she died about a month after. The declaration alleged, besides other special damage, that "by means of the premises the plaintiff had wholly lost and been deprived of the comfort, fellowship and assistance of his said wife, and had from thence and hitherto suffered and undergone great grief and vexation and anguish of mind."

Lord Ellenborough held that the jury could take into consideration only the bruises which the plaintiff had sustained and the loss of his wife's society and the distress of mind that he had suffered on her account from the time of the accident to the time of her death. And he announced the principle of his decision in the following celebrated *dictum*:

"In a civil court the death of a human being cannot be complained of as an injury."

It seems to be generally conceded that the common-law rule has for its basis and foundation only this dogmatic utterance.

It was also a rule of the common law that even though a person injured could sue and recover damages therefor, if he should die without instituting suit, or before a hearing could be had, the cause of action died with him. The result was that there could be no recovery whatsoever for injuries producing death except where the injured person prosecuted his action to a final judgment before his death ensued. Statutes providing for

⁴ 1 Camp. 493.

the survival of causes of action for injury to person and property have been generally adopted, with the result that such damages as were sustained by a decedent by reason of injuries inflicted upon him can be recovered by his administrator, either through a new action instituted after his death, or a revival of an action commenced by him in his life time. Inasmuch, however, as one does not suffer pecuniary damage by reason of his own death, such actions are limited to a recovery of damages for pain and suffering, medical expenses, loss of occupation, etc.

It was not until the enactment by the English Parliament in 1846, of the famous statute known as Lord Campbell's Act, which is the prototype of practically all American legislation on the subject, that actions were permitted to be maintained by personal representatives or heirs of a decedent for damages for his death when caused by wrongful act. Inasmuch as in many important particulars the exact verbiage of this act has been brought forward into the various American statutes, it is given herewith substantially in full:

"Section 1. Whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as would amount in law to felony.

"Section 2. Every action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs in recovering from the defendant, shall be divided among the beforementioned parties, in such shares as the jury by their verdict shall find and direct.

"Section 3. Provided always that not more than one

action shall lie for and in respect of the same subject-matter of complaint, and that every such action shall be commenced within twelve calendar months after the death of such deceased person."⁵

It was held by the English courts soon after the passage of this act that it created an entirely new and distinct action. Coleridge, J., said in one of the first cases: ⁶

"This act does not transfer this right of action to his representatives, but gives to his representatives a totally new right of action on different principles."

In *Seward v. The Vera Cruz*,⁷ Lord Blackburn said: "A totally new action is given against the person who would have been responsible to the deceased if the deceased had lived, an action which is new in its species, new in its quality, new in its principles, in every way new, and which can only be brought if there is any person answering the description of the widow, parent or child, who under such circumstances suffers pecuniary loss." Much confusion of thought has arisen, and is manifested both in the opinions of the courts and in the text-books, as to the true relation one to another of the new and independent cause of action thus given for damages caused by death and the right of the injured person transmitted by the survival statutes to recover the damages sustained by him prior to his death. The question has been many times presented for determination whether a recovery under one statute bars a recovery under the other. There are many cases, both English and American, which hold that where one is injured, and, after lingering some time dies, separate actions can be maintained by his administrator under a survival statute for the damages suffered by him prior to his death, and as the representative or trustee of the heirs at law under Lord Campbell's Act and similar statutes for the damages suffered by them because of the death itself. Some few courts have been misled by these cases into holding that under such circumstances a recovery by the injured person in his life time or a release executed by him does not bar a suit after his

⁵ 85 Stat. at Large, p. 693; 9 & 10 Vict., c. 93.

⁶ *Blake v. Midland R. Co.*, 18 Q. B. 93.

⁷ 10 App. Cas. 59.

death, for damages by reason of his death, and it is the purpose of this article to show that the two classes of cases depend upon wholly distinct principles and are solvable upon entirely different reasons.

Section 2 of Lord Campbell's Act limits the damages which may be recovered for injuries producing death to "such damages as they (the jury) may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought."

It is thus evident from the very language of the statute that no damages can be awarded except to compensate those dependent upon the decedent for the loss suffered by them by reason of his death. Some of the statutes authorize such suits to be brought in the name of the personal representative as the representative not of the decedent but of the heirs, while others require that the heirs themselves sue, but in either event the recovery is based upon the same element of damage. It is manifest that the heirs or dependents suffer no legal damages by reason of the pain or suffering of the injured person, or the expenses of his sickness, and it has, therefore, been many times held that these things cannot be recovered for under Lord Campbell's Act.

In the recent case of *Michigan Central R. Co. v. Vreeland*,⁸ the Supreme Court of the United States pointed out that under the Federal Employers Liability Act as originally enacted, there was no provision for any survival of the right of action created in behalf of an injured employee for the damages suffered by him in his life time, and that such cause of action was, therefore, extinguished by his death. It was shown that the act is strikingly similar to Lord Campbell's Act, that it "is independent of any cause of action which the decedent had and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is, therefore, a liability for the pecuniary damage resulting to them, and for that only."

⁸ *Supra*.

In *Blake v. Midland R. Co.*,⁹ it was early held that in assessing damages under Lord Campbell's Act the jury could not take into consideration the mental suffering of the plaintiff for the loss of her husband, but that they must be limited strictly to the pecuniary loss suffered by her because of his death. This principle has been applied by nearly all of the American courts. In some States, however, recent statutes have authorized the recovery in one action of all damages which the injured person himself suffered and those which accrued to his dependent heirs by reason of his death.

For the reason, therefore, that the damages recoverable under Lord Campbell's Act and under the survival statutes are entirely separate and distinct, the English courts had no difficulty in deciding that separate and distinct causes of action existed, in which the two classes of damages might be recovered.¹⁰

It is manifest that such a holding is necessary in order to permit the recovery of full damages for injuries producing death where an interval ensues between the infliction of the injuries and death. If it be held that a recovery under Lord Campbell's Act, in which damages can only be awarded based upon the effect of the death upon the surviving dependents, bars an action to recover the damages sustained by the decedent himself because of his pain and suffering and otherwise, it is manifest that the guilty defendant will have wholly escaped the consequences of the wrongful injury insofar as the injured person himself was concerned. While, therefore, some courts have held that the two actions cannot both be maintained, the vast weight of authority is to the contrary. One of the leading cases on the subject is that of *Brown v. Chicago & Northwestern R. Co.*,¹¹ in which the court reviewed nearly all of the cases, English and American, and reached the conclusion that there was no inconsistency between the two actions. Another leading case

⁹ *Supra*.

¹⁰ *Blake v. Railroad Co.*, 10 Eng. Law & Eq. 443; *Leggott v. Railroad Co.*, 1 Q. B. Div. 599; *Bradshaw v. Railroad Co.*, L. R. 10 C. P. 189; *Barnett v. Lucas*, 6 Lr. R. C. L. 247; *Robinson v. Railroad Co.*, App. Cas. 481; *Seward v. Vera Cruz*, 10 App. Cas. 59; *Pym v. Railroad Co.*, 4 Best & S. 396.

¹¹ 102 Wis. 137, 78 N. W. 771.

to the same effect in *Steward v. United Electric Light & Power Co.*,¹² in which the Maryland Court of Appeals reviewed at length the various cases and forcibly pointed out that there is nothing incongruous or contrary to fixed legal principles in the assertion that the same wrongful or negligent act might give rise to two separate causes of action if different injuries have been inflicted by it on different persons, and that it is the concurrence of the act and the injury resulting from it which constitutes the causes of action; that the same act might injure different individuals in different ways, and that there is, therefore, no reason why these different individuals should not have separate actions for the recovery of the damages sustained by them, respectively, even though these damages flow directly from the same cause.

In *Sutherland on Damages*,¹³ it is said that: "The actions thus provided for give damages mostly of a different nature, and it would seem quite consistent with the policy of the statutes, if not necessary to their natural force and operation, to allow both classes of damages. To hold otherwise, if death ensues from the personal injury for which the injured person has a right of action, is unwarrantably to restrict the operation of the statute. There is nothing on the face of these statutes to make one operate to repeal the other or to require election under which the action should be brought, with the effect of renouncing the right given by the other."¹⁴

While, there are some decisions to the contrary, it is believed that the vast weight of authority, both in England and in this country, is to the effect that by reason of the different nature of the damages which are recoverable under survival statutes and under Lord Campbell's Act, different causes of action are created which can be proceeded with concurrently. This is always subject to the condition, however, that the deceased has done nothing in his lifetime to extinguish both causes of ac-

¹² 104 Md. 332, 65 Atl. 49.

¹³ Vol. 4, § 1260.

¹⁴ This principle has been enunciated in *V. & M. R. Co. v. Philips*, 64 Miss. 693; *Davis v. Railroad*, 53 Ark. 117; *Hrust v. Detroit City R. Co.*, 84 Mich. 539; *Connors v. Burlington R. Co.*, 71 Iowa 490; *Putnam v. So. Pac. R. Co.*, 21 Ore. 230; *Belding v. Black Hills, etc., R. Co.*, 3 S. D. 369; *Bowes v. Boston*, 155 Mass. 314, and in other cases.

tion, and thus to prevent any recovery being had by reason of the wrongful act which produced his injuries and his subsequent death. Of course, where death is instantaneous, no such question can arise, for in that case, inasmuch as the decedent has himself suffered no legal damages, such as physical and mental pain and anguish, loss of earning capacity, outlays for medical expenses, etc., no cause of action is transmitted to his personal representative under the survival statutes, the only cause of action being that founded upon Lord Campbell's Act, in which damages for the death alone are recoverable. On the other hand, as suits for death by wrongful act are designed only to recompense the heirs and dependents of the decedent for the loss suffered by them by reason of his death, and the deprivation of his care and support, it is immaterial whether or not death resulted instantaneously from the injuries.

Some years after the rendition of the decision in *Blake v. Railway Co.*¹⁵ in 1852 and in which and the subsequent English cases theretofore cited, the rule was announced that Lord Campbell's Act created a new, separate and distinct cause of action from the one theretofore existing in favor of the injured person himself, the contention was advanced that these new causes of action could not be defeated or surrendered by the injured person either by executing a release of all damages sustained or recovering a judgment therefore in his lifetime. It was argued that such persons had no interest in or control over actions under Lord Campbell's Act; that it was not enacted for their benefit, did not become effective until after their death, and was designed for the protection of their families. The reasoning of the cases above cited as holding that an administrator can recover in one action the damages sustained by an injured person and in another those suffered by his heirs by reason of his death, was sought to be applied. In *Read v. Railway Co.*,¹⁶ which was an action under Lord Campbell's Act, it was held, however, that the plea of accord and satisfaction with the deceased in his lifetime was good. Blackburn, J., thought it necessary to qualify the declarations of the earlier cases by saying that the

¹⁵ *Supra*.

¹⁶ L. R. 3 Q. B. 555.

action provided by Lord Campbell's Act "is not new in the sense that there is an independent cause of action vested in the representatives of the deceased in their own right." He continued, "I think it (the statute) meant to say that if the party injured had not in his lifetime received compensation the defendant would be liable to an action by the executor or relatives for the loss which they had sustained from his death." This decision was construed in the subsequent case of *Griffiths v. Earl of Dudley*,¹⁷ as "a clear decision that Lord Campbell's Act did not give any new cause of action but only substituted the right of the representative to sue in the place of the right which the deceased himself would have had if he had survived." These cases have been followed in subsequent English decisions, and the law is now firmly established in that jurisdiction that a release executed or recovery had by an injured person in his lifetime bars an action by his heirs under Lord Campbell's Act.

These cases have been many times cited as being in conflict with *Blake v. Railway Co.*,¹⁸ and those in which it has been followed, and it is submitted that if regard be had, not to the conclusion reached, but to the reasoning upon which it is based, there is some just ground for this idea. It is hard to reconcile the statement in *Read v. Railway Co.*, that "it was not the intention of the English statutes to make the wrongdoer pay twice for the same injury," with the holding in *Blake v. Railway Co.*, that where no action is had or taken by the deceased in his lifetime the wrongdoer can be made to pay twice, once in a suit by the administrator under the survival statute for the injuries sustained by the decedent in his lifetime, and again by the administrator, in an action under Lord Campbell's Act, for damages for the death. There is just as much a double recovery in this case as where, if a person obtained judgment for injuries suffered by him and subsequently died of those injuries, his personal representatives were thereafter permitted to recover damages for his death.

Again, it is impossible to harmonize the statement in *Griffiths*

¹⁷ 9 Q. B. D. 357.

¹⁸ *Supra*.

v. Earl of Dudley that Lord Campbell's Act did not give any new cause of action whatsoever, but only substituted the right of the representative to sue in the place of the right which the deceased himself would have had if he had survived, with the precise and elaborate statement in the prior cases that an entirely new and different cause of action was in fact created. The apparent conflict in these cases and the impossibility of reconciling the language used has given rise to much of the confusion which is to be found in the text-books and the adjudicated cases as to the proper construction of statutes founded on Lord Campbell's Act. By reason of the fact that they in most instances bear so close a resemblance thereto, the American courts in construing them have properly paid great deference to the decisions of the English courts, and the cases from which the above quotations have been given may be found cited in nearly all of the American decisions. Although the language used in these opinions is, as has been said, conflicting and in some particulars irreconcilable there is no real inconsistency in holding that where a person is injured and dies without executing a release or recovering damages, his administrator can recover such damages as he himself might have recovered in his lifetime, and can also on behalf of his dependent heirs obtain judgment for damages for his death, and in the conclusion that if the deceased in his lifetime has done anything to extinguish the entire cause of action the effect will be to bar a proceeding for damages after his death. It is submitted that the question of whether or not Lord Campbell's Act created a wholly new and distinct cause of action is not at all controlling in determining the effect of a release or recovery by the deceased in his lifetime, but that this problem can properly be solved only by resort to the language of the act itself. The new right which was given to sue for damages resulting from the death of injured persons was expressly limited to such cases "as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof." It will be seen, therefore, that whether or not the new right was a continuation, as has sometimes been claimed, of the right existing in the injured person, or entirely new, separate and distinct, it was granted upon

a condition, and could only come into being and be availed of when that condition existed. No right was conferred to sue under all circumstances for damages for death resulting from injuries received. If this had been done it would indeed have conferred a radically new and different cause of action which would have existed whether or not the death had been caused by the wrongful act of any other person. The purpose of the statute was to award insofar as might be, a pecuniary recompense for death where it resulted from such injuries as under existing law would warrant a suit by the injured person for the damages suffered by him. It was, therefore, expressly conditioned that the circumstances must be such as would uphold an action by the deceased person. If anything in the relation existing between him and the person who was responsible for the infliction of the injuries, had the effect to preclude him from maintaining an action therefor, under the precise terms of the statute, it would likewise result in preventing a suit for his death. Where, for instance, death results from negligence, the question to be determined in each instance is whether or not the negligence was such that the party injured might have maintained an action, and its solution will necessarily depend primarily upon the relation borne by the defendant to the injured party, in order that it may be determined whether the neglect was in respect to any duty owing by the former to the latter. "According to the circumstances of the particular case, the answer may depend upon the law of master and servant, of passenger and carrier, of landlord and tenant, or vendor and purchaser, upon the law in respect to the liability of the owners of property of every description for injuries arising from its use, upon the law of highways, of municipal corporations, in short, upon any one of the many branches of the law that are commonly treated of in works upon negligence."¹⁹

In jurisdictions where contributory negligence may be pleaded in bar of actions for personal injuries, the existence of such negligence by the deceased will likewise bar an action for damages for his death, and if the injuries be the result of a risk

¹⁹ Tiffany on Death by Wrongful Act, § 65.

assumed by the injured person his heirs will be prejudiced to precisely the same extent as he would be in a suit brought by him. This has been many times held, and, as has been said, results necessarily from the language of the statute itself and from the manifest end to be attained by it. It was never intended to create new rules of liability in the sense that an act which theretofore was not wrongful because it was characterized by no breach of duty, should thereafter become so. It was only intended to create a remedy which did not then exist for a wrong which was already recognized as a wrong.

The conditions above referred to as having the effect of preventing an action by the injured person himself, and, therefore, barring one by his heirs for his death, are those which have existed prior to or contemporaneously with the time when he received his injuries. Precisely the same reasoning, however, applies to anything which he may have done after the injuries were inflicted upon him which would have had the effect of preventing him from exercising his right to demand damages for the wrong done him. If, after receiving his injuries, he executed a release under such circumstances as would make it effectual for the purpose of extinguishing his right of action and preventing him from maintaining a suit for damages, it is manifest that the condition imposed by Lord Campbell's Act could not be met and the new cause of action thereby created could not and would not come into being. The circumstances would not then be such as to have enabled the injured person to have brought suit if death had not ensued, and, therefore, no such action could be instituted by his heirs. Again, if, after receiving injuries, a person should institute suit and recover damages and thereafter died as a result of the injuries, the condition imposed by Lord Campbell's Act could not be met for the same reason, namely, that the deceased in his lifetime had voluntarily created such a situation as would disable him from maintaining an action if death had not ensued.

As was said by the Supreme Court of the United States in *Michigan Railway Co. v. Vreeland*,²⁰ "as the foundation of the

²⁰ *Supra*.

right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury." Almost the same language as used in *Hecht v. Railway Co.*,²¹ where it was again emphasized that in order for the new remedy to become effective there must have existed a right of action in the injured person at the very instant of his death. This has been many times decided, but it does not seem to have been generally noted as marking the difference between the conclusion so often announced that an action by an administrator for the damages suffered by an injured person in his lifetime does not bar an action by his heirs for his death, and the almost unanimous holding that a recovery by an injured person in his lifetime does bar such an action for damages for his death.

The author of the very excellent work on *Death by Wrongful Act* heretofore cited, seems clearly to have overlooked the very obvious distinction between the two classes of cases. He correctly announces the general rule that a release or recovery by a decedent in his lifetime bars a subsequent action by his heirs, but expresses the belief that there is some inconsistency between the cases holding this and those holding that separate actions can be brought under the general survival statutes for injuries sustained by a decedent in his lifetime and under Lord Campbell's Act for damages suffered by his heirs on account of his death.²²

In discussing the two classes of cases he says that "certainly there is an apparent inconsistency in holding that the recovery of judgment by the party injured is a bar, and that the recovery by an administrator upon the identical cause of action is no bar, in an action for the death." It is obvious that there is no apparent inconsistency whatsoever, for the reason that where the injured party himself has recovered damages or given a release further action under Lord Campbell's Act cannot be had because

²¹ 132 Ind. 507, 32 N. E. 302.

²² Tiffany on Death by Wrongful Act, § 127.

of the condition imposed that before it can be invoked it must appear that the decedent was at the very instant of his death in a position to sue if he had not died. On the other hand, where an injured party dies without bringing suit or effecting a recovery the condition of the statute can be met because, under its literal terms, he could, if he had not died, have maintained an action.

It was pointed out by the New York Court of Appeals in *Littlewood v. Mayor*,²³ that there is in fact no conflict between the two classes of decisions, particular reference being had to the English cases above referred to. After citing *Blake v. Railway Co.*²⁴ and other similar cases, and contrasting them with *Read v. Railway Co.*,²⁵ and *Griffiths v. Earl of Dudley*,²⁶ it was shown that in none of the former cases had the deceased recovered damages for the personal injury from which death ensued, and, that therefore the question was not involved in any of them whether Lord Campbell's Act applied to a case where such a recovery had been had; that the action was brought by the representative as such for the cause of action claimed to have survived, and was held to have had no connection with and not to be affected by an action under Lord Campbell's Act, which was founded upon a personal injury for which no cause of action survived. It was held that there was no inconsistency whatsoever between these cases and the subsequent ones holding that a release or recovery by the injured party in his lifetime barred a subsequent suit for his death.

Several of the encyclopædias and text-books, and a number of judicial opinions state that there is considerable contrariety of opinion as to whether or not a release or recovery by a decedent in his lifetime bars an action by his heirs at law for his death, and it is believed that these announcements are the result of a failure to distinguish between suits instituted by administrators under the survival statutes, which, as has been shown, are generally held not to bar actions under Lord Campbell's Act, and those instituted by the injured person in his lifetime and prosecuted to judgment. As a matter of fact, there are few ques-

²³ 89 N. Y. 24.

²⁴ *Supra*.

²⁵ *Supra*.

²⁶ *Supra*.

tions as to which the courts are more thoroughly harmonized than whether or not a judgment in such an action or a release bars such a subsequent suit. A careful examination of the authorities leads to the belief that no court has in construing a statute founded on Lord Campbell's Act, squarely held that the effect of such a release or recovery is not to bar an action for the death. Inasmuch as nearly all of the American statutes which create a right of action for injuries producing death contain the condition imposed by Lord Campbell's Act that the circumstances must be such that the injured person would have had the right to sue if death had not ensued, it is difficult to see how there could be any great diversity of opinion.

In the recent case of *Perry v. Railroad Co.*,²⁷ the Superior Court of Delaware carefully reviewed all of the authorities, English and American, and reached the conclusion that there is no doubt whatsoever as to the result of a release or recovery by the decedent as a bar to an action by his heirs for his death. The same conclusion was reached by the Georgia Court in the case of *Southern Bell Telephone Co. v. Cassn*,²⁸ in which the statement is made that although the question has many times been presented to the courts for decision, the contrary has never been held except in Massachusetts and Kentucky. The Massachusetts statutes, however, are almost wholly dissimilar from Lord Campbell's Act in that they provide for the imposition of fines for the benefit of those whose bread-winners have suffered death by wrongful act. It is held, therefore, that a recovery in a common-law action of compensation by an injured person for the injury suffered by him in no way bars the imposition of such penalties. Of course, there is here no such condition as that imposed by Lord Campbell's Act that as a prerequisite to its operation the right to sue for damages must exist in the decedent at the very instant of his death.

The Kentucky case referred to is no doubt that of *Donahue v. Drexler*,²⁹ in which the statute giving a right of action for the death of "a person killed by the careless, wanton or malicious

²⁷ 24 Del. 399, 77 Atl. 725.

²⁸ 82 Ky. 157.

²⁹ 111 Ga. 575, 36 S. E. 881.

use of firearms, etc.," was applied, and it was held that an action thereunder was not barred by a recovery had by the decedent in his lifetime. The same observation may be made as to the situation presented to the Kentucky court as has been made as to the Massachusetts decisions. The statute under construction contained no condition that the right to sue must have existed in the injured person at the time of his death.

In a recent decision³⁰ the Supreme Court of Louisiana has held that a recovery in the lifetime of a decedent did not bar an action for his death, but here again the statute which authorized an action for damages for the death did not contain the same condition as appears in Lord Campbell's Act. It is submitted that none of these cases are in fact applicable where statutes similar to Lord Campbell's Act exist.

Another able and elaborate case is that of *Hecht v. Ohio Ry. Co.*,³¹ which upholds the effectiveness of the bar arising by reason of a recovery in the lifetime of the injured person.³² In *Thompson on Negligence*,³³ the rule is clearly announced that "the right of action in the personal representative, it has been held, depends, not only upon the character of the act from which death ensued, but also upon the condition of the decedent's claim at the time of his death. If the claim was in such a shape that he could not have enforced it had death not ensued the statute gives the executors no right of action and creates no liability whatever on the part of the person inflicting the injury. Therefore, where in an action by the personal representative of an injured person to recover damages for his death because of a

³⁰ *Dougherty v. N. O. Ry. & Light Co.*, 63 So. 493.

³¹ 132 Ind. 507.

³² To the same effect, see *Brown v. Electric Ry. Co.*, 101 Tenn. 252; *Dibble v. N. Y., etc., R. Co.*, 25 Barb. (N. Y.) 183; *Price v. Railway Co.*, 33 S. C. 556; *Kelliher v. Railway Co.*, 138 N. Y. Supp. 894; *Strode v. St. Louis Transit Co.*, 197 Mo. 623; *Mehegan v. Boyan City R. R. Co.*, 141 N. W. 911; *Suell v. Denicott*, 161 Ala. 262; *Seaboard Air Line R. Co. v. Allen*, 192 Fed. 481; *Blount v. Ry. Co.*, 82 S. W. 306; *Littlewood, Admr. v. Mayor*, 89 N. Y. 24; *McKeering v. Pa. R. R. Co.*, 65 N. J. L. 57; *Hill v. Pa. R. R. Co.*, 178 Pa. 223; *COOLEY, TORTS*, 263; 2 REDE. ON RAILROADS, 252; *PIERCE ON RAILROADS*, 392; *PATTERSON ON RAILWAY LAW*, 410-508; *SHERMAN & REDFIELD ON NEGLIGENCE*, 301.

³³ Vol. 6, § 7028.

wrongful act of the defendants, it was shown that the defendants had settled with the deceased in his lifetime and paid him the amount of his claim on account of the injury, it was held that this would bar the plaintiff's action."

It is believed that the foregoing authorities, to which others might be added, fully substantiate the statement that there is no real conflict in the American cases upon the question now under discussion. It has already been shown that the English courts have reached the same conclusion as those of this country, and the same is true of the Canadian courts. In *Canadian Pacific R. Co. v. Robinson*,³⁴ it was pointed out that an action under the Canadian statute was of the same nature, and, indeed, the same action in all respects, as that conferred by Lord Campbell's Act, and that it must, as an action on that statute is construed in England, be deemed to be a new action, but still one dependent on the condition that the action of the deceased had not at the time of his death been barred or extinguished. In the case of *Robinson v. Ry. Co.*, which arose in Canada and was decided by the House of Lords in 1892, the same doctrine was announced.

A question analogous to the one heretofore discussed arises where a person is injured and brings suit for the damages suffered by him, and thereafter dies and his administrator revives the suit under a survival statute and institutes another suit as the representative or trustee of the heirs at law to recover damages for the death. Only two cases dealing with this question have come under the writer's observation. In *Legg v. Britton*,³⁵ the Supreme Court of Vermont reached the conclusion that no substantial distinction can be drawn between such cases and those where an action was instituted by the decedent and a recovery was had prior to his death. It was held that although the injured person might die after the institution of the suit and that a recovery therein should be had by the executor or administrator, the recovery would be in the right of the intestate while living and in legal effect would ante-date his death and exhaust his right of action, and that nothing would remain to survive for a subsequent action for the death. It was said that such

³⁴ 54 Am. & Eng. Cases 49.

³⁵ 64 Vt. 652, 24 Atl. 1016.

a proceeding would exhaust the entire liability of the wrongdoer and that no liability whatsoever would remain to be enforced in any action. This is believed to be a correct decision.

On the other hand, in *Mahoning Valley R. Co. v. Van Alstine*,³⁶ the Supreme Court of Ohio reached precisely the opposite conclusion. The condition imposed as precedent to the institution of a suit for damages for death by wrongful act that the right to sue must have existed in the injured person, at the time of his death was not alluded to, and the decision was justified only upon the ground that separate causes of action were presented in behalf of the injured person in an action for his own damages, and in his heirs to recover damages for the death.

It is interesting to note in conclusion how entirely the reluctance which was manifested by the courts in applying the common law to place a value upon human life has been overcome by modern legislation and modern judicial thought. Indeed, it is not true that Lord Campbell's Act undertook to place a value upon human life. Its sole purpose was to afford a pecuniary recompense to those dependent upon one whose death had been caused by the wrongful act of another for the loss and deprivation which ensued to them by reason thereof. The preamble recites that "Whereas, no action at law is now maintainable against a person who by his wrongful act, neglect or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him," etc. Section 2, moreover, provides that "in every such case the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties injured, respectively, for whom and for whose benefit such action shall be brought."

It has been many times held that under this statute no recovery can be had by any person who has not been pecuniarily damaged, and that the amount to be recovered is determined, not by the value of the life of the deceased person, but by the amount of damages which has accrued to the plaintiffs thereby. The same rule has been incorporated in the Federal Employers' Act, and

³⁶ 77 Ohio St. 395, 83 N. E. 601.

it has been held that the pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary, but that there must be some reasonable expectation of pecuniary assistance or support of which the plaintiff had been deprived, and that compensation for such loss manifestly does not include damages by way of recompense for grief or wounded feelings.³⁷

On the other hand, the statutes of many if not most of the States now proceed upon the theory that wherever death is caused by wrongful act the wrongdoer must pay damages to the extent of the value of the life which has been taken, even though no one is in existence who has been pecuniarily damaged thereby. Thus, most statutes provide that recoveries for death by wrongful act may be had for the benefit of the heirs at law without regard to their dependence upon the decedent, and some go even so far as expressly to provide that if there are no heirs at law a recovery may be had by the administrator for the benefit of the estate. Again, the element of compensation is wholly lost sight of in the common provision that damages shall be distributed in accordance with the rules which control the distribution of the assets of a deceased person. Such provisions frequently work great hardship by reason of the fact that the grown children of a decedent who may be fully self-supporting and in no way dependent, share to the same extent in damages recovered for his death as his widow and minor children.

The tendency is also manifested where the relationship of master and servant exists, to create liability without regard to whether or not death was caused by any wrongful act whatsoever. Many of the leading States now have employees compensation acts which have this effect. When such statutes shall have been generally adopted and recoveries may, therefore, be had for injuries producing death without regard to whether or not such injuries have been wrongfully inflicted and whether or not any person whomsoever has been damaged in a legal sense, Lord Campbell's Act will have been as radically departed from as was the common law by its enactment.

O. W. Catchings.

VICKSBURG, MISS.

³⁷ Michigan Ry. Co. v. Vreeland, *supra*.